

FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OUTORDER TERM, 1953

No. 476

**BRANIFF AIRWAYS, INCORPORATED,
APPELLANT,**

vs.

**NEBRASKA STATE BOARD OF EQUALIZATION
AND ASSESSMENT, ET AL**

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED NOVEMBER 22, 1953

Probable jurisdiction noted January 4, 1954



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 476

BRANIFF AIRWAYS, INCORPORATED,
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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA

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[fols. 1-2]

[Caption omitted]

[fol. 3] **IN THE SUPREME COURT OF NEBRASKA**

MID-CONTINENT AIRLINES, INC., a Corporation, Plaintiff,

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT:

PHILIP K. JOHNSON, Nebraska State Tax Commissioner;
 VAL PETERSON, Governor of Nebraska; JAMES S. PITTEN-
 GER, Secretary of State of Nebraska; RAY C. JOHNSON,
 State Auditor; FRANK HEINTZE, Treasurer of Nebraska;
 and CLARENCE S. BECK, Attorney General of Nebraska,
 Defendants

General Number

PETITION IN ORIGINAL ACTION FOR DECLARATORY JUDGMENT—
 Filed July 16, 1952

1. Permission to file this original action in accordance with the Rules of this Court having heretofore been obtained, plaintiff files this, its petition seeking a declaratory judgment in this Court under the laws of the state of Nebraska (Sections 25-21,149 to 21,164, R.S.N. 1953, construed in *Moeller, McPherrin & Judd v. Smith*, 127 Neb. 424; *State, Ex Rel. Smrha v. General American Life Insurance Co.*, 132 Neb. 520; *Thorin v. Burke*, 146 Neb. 94).

2. Plaintiff seeks to have declared null and void and non-enforceable against it by the defendants Sections 77-1244 to 1250, R.S.N. 1943, Reissue 1950, for the reason that said statute is in violation of Article I, Section 8, Clause 3, of the Federal Constitution, which gives to the National Congress alone the right to regulate commerce among the several states, and Article I, Section 9, Clause 6, of the Federal Constitution which provides, as a prohibition against the State of Nebraska, that no vessel bound to or from one state shall be obliged to pay duties in another state. Furthermore, Article I, Section 10, Clause 3, of the Federal Constitution specifically provides that no state shall, without the consent of Congress, lay any duty of tonnage. All these provisions of the Federal Constitution have been violated by the defendants under the terms of

said Act, especially Article I, Section 8, Clause 3, which prohibits the State of Nebraska from levying an ad valorem [fol. 4] tax upon the air flight equipment of the plaintiff as provided in said Act. No other questions are presented to this Court for final adjudication except the violation of these sections of the Federal Constitution.

3. Accordingly, as will hereinafter more fully appear, this Court, under the admonition of the Federal Constitution, Article VI, Clause 2, should declare said Nebraska statute to be null and void and nonenforceable against the air flight equipment of the defendant because used in interstate commerce.

4. The incident of the tax is the airship fully equipped for flight, and the ad valorem tax thereon burdens commerce between the states by permitting the defendants to levy a tax on such airships of the plaintiff solely because they are within the State of Nebraska while engaged in interstate commerce and attain no taxable situs while so engaged. It will be seen from the reading of the Act that its terms are made applicable only to air flight equipment, which means, according to the terms of the Act and as a matter of fact, the airplane fully equipped to carry persons and property into and out of the State of Nebraska in interstate commerce. The question presented to the Court has no application to real and personal property of the plaintiff that is taxable, because the same has a taxable situs in the state and the plaintiff does pay taxes and assessments on all such other of its property within the State of Nebraska.

5. The amount of the tax levied unlawfully, as claimed by the plaintiff, for the year 1950 is approximately \$4,000.00, and a similar amount for 1951, neither of which sums has been paid by the plaintiff. Defendants are now engaged in assessing other and additional amounts against the plaintiff for the year 1952, and will continue to do so to the injury and damage of the plaintiff unless in this action this Court decrees said taxing statute to be null and void and contrary to the provisions of the Federal Constitution and therefore nonenforceable, and that the taxes assessed be cancelled and future taxes, if any, sought to be levied by the defendants be permanently restrained and enjoined.

6. Having stated the jurisdictional questions and the legal points involved, the plaintiff further alleges as follows:

[fol. 5]

I

Plaintiff is a corporation organized under the laws of Delaware as an air carrier of persons and property, having its home port, to which all of its airplanes must return, at Minneapolis and St. Paul and its general offices and principal place of business at Kansas City, Missouri. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate transportation by air for hire. Plaintiff's rights, activities and operations are subject to and are all carried on by permission and under the authority of the United States of America, as defined in the United States "Civil Aeronautics Act," Title 49 U.S.C. § 401 to 705. By virtue of such federal authority, plaintiff has been federally licensed to operate as an air carrier, and in pursuance thereof owns and operates a large number of aircraft upon regular schedules in trunk line flight throughout the central portion of the United States from Minot, North Dakota, to New Orleans, Louisiana, alighting in and ascending from the states of North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. Plaintiff's aircraft enter the State of Nebraska from the air above and leave Nebraska into the air above. Plaintiff's aircraft are in the State of Nebraska only temporarily to unload and load passengers, mail, and personal property in interstate flight.

II

The defendants constitute the administrative and law enforcement officials of Nebraska on all matters pertaining to the ad valorem personal property taxes assessed by them against plaintiff's aircraft for alighting in and departing from this state. The defendant, State Board of Equalization and Assessment, is composed of all the defendants named (Sections 77-501 and 502, R.S.N. 1943), except the defendant Attorney General, who is the law enforcing official for said Board and the members thereof in the matters of state taxation. Each defendant is the duly

qualified and acting official and Board member of said State Board of Equalization and Assessment, and the defendant, Philip K. Johnson, is the State Tax Commissioner, as designated and described in the above-caption and is a member of said defendant Board. Each defendant is a citizen of the State of Nebraska.

[fol. 6]

III

The state Act in question directs the defendants to evaluate, assess, levy, and enforce the collection of the said ad valorem personal property tax based on the valuation of plaintiff's interstate "flight equipment" as found, assessed, and enforced by the defendants. The said flight equipment as defined in said Act consists solely of aircraft fully equipped for flight as an air carrier. The aircraft is used solely to carry on the activities in interstate commerce as described above. Plaintiff's aircraft are taxed under the state Act questioned herein when they descend from the air and remain in Nebraska for the short periods of time necessary to unload and load passengers, mail, and personal property moving in interstate commerce. The taxed aircraft temporarily descend from the air into Nebraska and continue their interstate flight into the air carrying interstate-bound persons and property.

IV

By the terms of said Act (77-1244 to 1250) aircraft engaged solely in intrastate flight, operating from a fixed base in the state, are exempt from the tax upon aircraft, and thus only aircraft engaged in interstate commerce are subject to the questioned tax.

V

On or about December 1, 1950, to save interest at ten per cent and penalties for nonpayment and to avoid the issuance of a distress warrant, plaintiff herein sought to pay under protest the taxes levied for 1950. By so doing, plaintiff sought to sue for the recovery of the tax paid, but said right and authority to so proceed were held by the defendant Attorney General to have no application to the spe-

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cial tax statute for air carriers as defined in said Act and as set forth above.

Wherefore, plaintiff, Mid-Continent Airlines, Inc., a corporation, prays:

1. That this Court determine and find that the sections of the Nebraska statute, Sections 77-1244 to 1250, R.S.N. 1943, be declared null and void and nonenforceable in each and all its sections and provisions, upon the grounds that such Act, and each and every part thereof, violates one or [fols. 7-8] more of the Commerce Clauses of the Federal Constitution set forth above.

2. That this Court restrain and enjoin the defendants, and each of them and their successors in office, from performing any of the provisions of said Sections 77-1244 to 1250, R.S.N. 1943, Reissue of 1950, and restrain and enjoin the defendants, and each of them, from issuing a distress warrant or distress warrants or seeking to collect the tax for 1950 or for 1951, or the interest or penalties provided by the Act, or from in any other manner seeking to enforce the assessment, levy, or collection of any tax or assessment heretofore made or to be made under said Sections 77-1244 to 1250 of said Nebraska Revised Statutes for 1943 as amended.

3. That plaintiff be granted such other and further relief as the Court may deem just and equitable in the premises, the recovery of its costs, and a declaratory judgment so announcing with finality the adjudication of this Court on the constitutional invalidity of said Nebraska air flight equipment statute.

Dated at Omaha, Nebraska, July 12, 1952.

Mid-Continent Airlines, Inc., a Corporation, Plaintiff, By (S.) Wm. J. Hotz, Of Hotz & Hotz, 1530-5 City National Bank Building, Omaha, Nebraska, Its Attorneys.

Duly sworn to by William J. Hotz. Jurat omitted in printing.

[fol. 9] IN THE SUPREME COURT OF THE STATE OF NEBRASKA

[Title omitted]

ANSWER—Filed Aug. 18, 1952

Come now the defendants and for answer to the plaintiff's petition say:

1. Defendants admit the allegations stated in paragraph numbered 1 (Arabic).

2. Defendants deny the allegations stated in paragraph numbered 2 (Arabic) that the act consisting of sections 77-1244 to 77-1250, R.R.S. 1943 runs afoul, or violates any, of those provisions of the Constitution of the United States which are cited by plaintiff in paragraph numbered 2 (Arabic).

3. Defendants deny the allegations contained in paragraph numbered 3 (Arabic).

4. Defendants deny generally all the allegations stated in paragraph numbered 4 (Arabic), but specifically admit only so much of the allegations of said paragraph as affirm, substantially, that the tax authorized to be levied by the act is to be levied upon flight equipment owned by the plaintiff.

Defendants say further that there is involved in this action the propriety of the exercise by the legislature of a power so to classify all tangible property assumed to have a tax situs in Nebraska as to discriminate between tangible [fol. 10] property having a local situs and tangible property having a general situs, and to fix the situs of the latter class within a taxing district having boundaries co-terminous with the boundaries of the state, the legislative purpose being to require all tangible property to be subjected to an ad valorem tax, the property having a local situs being assessed by a local assessor and the tax thereon being levied by a county board of equalization, and property having a general situs being assessed by the Tax Commissioner or the State Board of Equalization and Assessment and the tax thereon being levied by said board, the legislative object being to obtain uniformity of valuation and in the case of property having general situs to avoid and

obviate arbitrary and discriminatory action by local authorities, this legislative purpose being applied in the case of all transportation properties, including aircraft, an increment of the value of which rises out of the use to which such property is devoted, transportation of persons and property in intrastate and interstate commerce. Defendants admit that all tangible property of the plaintiff, other than aircraft, is assessed and taxed locally upon the same footing as all other tangible property in the state.

5. Defendants deny generally all the allegations of paragraph numbered 5 (Arabic) but specifically admit that the ad valorem taxes authorized by the act were levied upon a portion of plaintiff's flight equipment for the tax years 1950 and 1951, and that the tax so levied is in the approximate amount stated by plaintiff, and that, similarly, a tax will be levied upon a portion of plaintiff's flight equipment for the tax year 1952.

6. Defendants admit all the allegations of paragraph 6-I, save and except so much thereof as alleges that plaintiff's aircraft are in the State of Nebraska only temporarily to unload and load passengers, mail and personal property in interstate flight. Defendants say that plaintiff's aircraft are engaged in the business of transporting by air persons and property in Nebraska in intrastate and interstate commerce.

[fol. 11] 7. Defendants admit the allegations stated in paragraph 6-II.

8. Defendants deny the allegations stated in paragraph 6-III, and say that the statute challenged by plaintiff, sections 77-1244 to 77-1250, R.R.S. 1943, directs the Tax Commissioner of the State of Nebraska to ascertain and determine the value of all aircraft fully equipped for flight of all air transportation carriers incorporated or doing business in Nebraska, save and except the aircraft of carriers engaged solely in intrastate commerce and whose aircraft is based at only one airport within the state, and then to assess only so much of that value as may properly be apportioned to Nebraska, the apportionment being calculated by the formula prescribed in section 77-1245, which formula purports to reach so much of the value of the aircraft as is related to its use in Nebraska. Defendants say, further,

that the Tax Commissioner of Nebraska is an administrative officer with quasi-judicial powers whose office is created by section 28 of Article V of the Constitution of Nebraska, and in the performance of the duties and in the exercise of the powers pertaining to the office the Tax Commissioner has, in respect of the plaintiff and other carriers, so enforced the provisions of the challenged statute as to give to it an administrative construction which limits the range of application of the statute to aircraft of carriers who are engaged in business in Nebraska every day in the year and who have aircraft within the jurisdiction of Nebraska every day of the year; that plaintiff's aircraft move over fixed routes and regular schedules, daily, within the jurisdiction of Nebraska, doing intrastate and interstate business every day in the year at airports at Lincoln and Omaha, Nebraska. Defendants further say that the State Board of Equalization and Assessment is a tribunal having quasi-judicial powers, created by section 28 of Article IV of the Constitution of Nebraska, its members being the Governor, the Secretary of State, the State Auditor, the State Treasurer, and the Tax Commissioner, and that this board, pursuant to the command of the challenged statute, [fol. 12] levies a mill tax in an amount equal to the average rate of the mill tax levied upon all tangible property throughout the several taxing districts of the state, upon the valuation for tax purposes of so much of plaintiff's aircraft as is determined by the Tax Commissioner to have a tax situs in Nebraska; that the average mill rate so levied upon a portion of the value of plaintiff's aircraft is invariably lower than the rate levied upon tangible property having a fixed situs for taxation within the boundaries of the taxing districts within which are situated the cities of Lincoln and Omaha, respectively.

9. Defendants deny the allegations contained in paragraph 6-IV, and say that aircraft which are engaged solely in intrastate transportation and are based at only one airport within Nebraska are subject to assessment and taxation as tangible property having a local situs, and that all aircraft are subject to assessment and taxation under the provisions of the challenged statute if the case be that such aircraft are engaged solely in intrastate commerce

and are based at more than one airport in Nebraska; and if the case be that aircraft are engaged in intrastate and interstate commerce, or if such aircraft are engaged in interstate commerce, and the case be, further, in respect of the latter two classes, that such aircraft move over fixed routes and regular schedules, and are found, every day of the year within the jurisdiction of Nebraska.

10. Defendants admit that plaintiff made inquiry of the Tax Commissioner whether the tax could be paid under protest but say that plaintiff was advised that no statute authorizes suit to be brought to recover back taxes paid, whether or not paid under protest, into the general fund of the State of Nebraska and that the taxes levied in this case are taxes which are required to be paid into the general fund. Defendants admit that the taxes levied draw interest at ten per centum per annum, if not paid when due, but deny that any other penalties are imposed for delinquency, and deny that any distress warrant has heretofore been issued or that any will be issued during the [fol. 13] pendency of litigation concerning the validity of the challenged statute. Defendants deny, otherwise, the allegations of paragraph 6-V.

Nebraska State Board of Equalization and Assessment; Philip K. Johnson, Nebraska State Tax Commissioner; Val Peterson, Governor of Nebraska; James S. Pittenger, Secretary of State of Nebraska; Ray C. Johnson, State Auditor; Frank Heintze, Treasurer of Nebraska; and Clarence S. Beck, Attorney General of Nebraska, Defendants. By: Clarence S. Beck, Attorney General, By: (S.) William T. Gleeson, Deputy Attorney General, Attorneys for Defendants.

[fols. 14-15] *Duly sworn to by Clarence S. Beck. Jurat omitted in printing.*

[fol. 16] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION OF FACTS—Filed Feb. 26, 1953

1. Plaintiff is a corporation, organized and existing under the laws of the State of Delaware with its corporate place of business at Wilmington in said state. The principal object of its incorporation was and is the owning and operating of airplanes as carriers by air of persons and property for hire. From other states it operates its planes for such purposes on regularly scheduled stops in and out of the State of Nebraska. All its planes are fully equipped for flight through the air and are designed and constructed to descend from the air above to an airport built for the landing and taking off of such aircraft. Two such landing fields have been provided for such purpose in Nebraska, one by the municipality of Omaha, and one by the municipality of Lincoln. At these air fields plaintiff neither owns nor maintains hangars for reconditioning, overhauling, repairing, or storing aircraft, its engines, or any of its flight equipment.

2. Plaintiff's principal activities in Nebraska consist of descending from the air above the state to unload persons and property from other states and promptly load persons and property in the same aircraft at the Omaha airport and ascend into the air and continue the scheduled flight through the air to the scheduled destinations in other states. There are fourteen of such flights in and out of Omaha each day. Plaintiff's aircraft move in a continuous circuit, so to speak, with planes moving in and out of the circuit from the overhaul base in Minnesota, there being constantly in use in the circuit all of plaintiff's aircraft [fol. 17] which are not at the overhaul base; notwithstanding the fact that a particular plane may, during the course of its flight in the circuit, be given one or more flight numbers and thus a given flight be spoken of as originating and terminating at specified cities.

3. Since July 15, 1951, the plaintiff has been authorized by the Civil Aeronautics Administration of the United States, for a trial period of three years, to land at the air-

port at Lincoln, Nebraska, on two southbound flights through Omaha while en route to Missouri and points beyond, and on two flights from Missouri while en route to Omaha and points in other states to the north. Consequently, persons and property may be loaded on such flights at Omaha for Lincoln and at Lincoln for Omaha.

4. Mid-Continent Airlines and Braniff Airways, Incorporated, which were consolidated effective about August 1, 1953, operates 7,336 unduplicated route miles over the air lanes, serving sixty communities in the United States plus Latin American and Mexican routes.

5. The plaintiff operates fourteen flights through Omaha, Nebraska, as above stated, as follows:

[fol. 18] Mid-Continent Airlines, Incorporated

Flight Data

Listed below are all the scheduled flights of Mid-Continent Airlines as operated through Omaha, Nebraska. This data gives the originating station of each flight and the arrival and departure times into and out of Omaha, Nebraska, showing the next scheduled stop beyond Omaha, Nebraska.

These flights are separated into southbound and northbound flights.

Southbound

Flight Number

- 23 Originates in Omaha, Nebraska, 7:00 am, arriving Lincoln, Nebraska, 7:27 am, flying non-stop to St. Joseph, Missouri, then to Kansas City, Missouri and St. Louis, Missouri. Equipment used on this flight leaves Minneapolis/St. Paul, Minnesota, 7:00 pm the evening before and arrives in Omaha, Nebraska, 9:55 pm, after scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa.
- 395 Originates in Minneapolis/St. Paul, Minnesota, 7:25 am, making scheduled stops at Sioux Falls, South Dakota and Sioux City, Iowa, arriving in Omaha, Nebraska at 9:47 am. This flight leaves Omaha 10:07 am, flying non-stop to Kansas City, Missouri, then to Tulsa, Oklahoma and Houston, Texas.

Flight Number

- 39 Originates in Minneapolis/St. Paul, Minnesota, 11:30 am, with scheduled stops in Sioux Falls, South Dakota and Sioux City, Iowa, and arrives in Omaha, Nebraska, 2:25 pm. This flight leaves Omaha 2:40 pm, flying non-stop to St. Joseph, Missouri and then to Kansas City, Missouri.
- 97 Originates in Minneapolis/St. Paul, Minnesota, 2:30 pm, flying non-stop to Omaha, Nebraska, arriving 4:14 pm. This flight leaves Omaha 4:29 pm, flying non-stop to Kansas City, Missouri and to Houston, Texas.
- 9 Originates in Minneapolis/St. Paul, 4:15 pm, with scheduled stops at Watertown, Huron, and Sioux Falls, South Dakota; and Sioux City, Iowa, and arrives in Omaha, Nebraska, 8:37 pm. This flight departs from Omaha 8:52 pm and arrives in Lincoln, Nebraska, 9:19 pm, leaving Lincoln, 9:24 pm, flying non-stop to Kansas City, Missouri.
- 319 Originates in Minneapolis/St. Paul 8:50 pm, flying non-stop to Omaha, Nebraska, arriving 10:09 pm. This flight leaves Omaha 10:29 pm, flying non-stop to Kansas City, Missouri.

Northbound

- 16 Originates in Kansas City, Missouri, 7:40 am, flying non-stop to Omaha, Nebraska, arriving 8:45 am. This flight leaves Omaha 9:00 am, flies non-stop to Sioux City, Iowa, and then to Sioux Falls, Huron and Watertown, South Dakota; and terminates in Minneapolis/St. Paul, Minnesota.
- 18 Originates in Kansas City, Missouri, 9:15 am, flying non-stop to Omaha, Nebraska, arriving in Omaha 10:20 am. This flight leaves Omaha 10:35 am, flying non-stop to Minneapolis/St. Paul, Minnesota.

[fol. 19] Flight Number

- 4 Originates in Kansas City, Missouri, 12:15 pm, stopping in St. Joseph, Missouri, arriving in Lincoln, Nebraska, 1:36 pm. This flight leaves Lincoln 1:41 pm, arriving in Omaha 2:08 pm. This flight leaves Omaha 2:23 pm, flying non-stop to Sioux City, Iowa.

Flight Number

- 302 Originates in Kansas City, Missouri, 2:45 pm, flying non-stop to Omaha, arriving 3:35 pm. This flight leaves Omaha, 3:50 pm and flies non-stop to Minneapolis/St. Paul, Minnesota.
- 38 Originates in St. Louis, Missouri, 3:30 pm after stopping in Kansas City, Missouri and St. Joseph, Missouri, it arrives in Lincoln, Nebraska 6:41 pm. This flight leaves Lincoln 6:46 pm, and arrives in Omaha, 7:13 pm. This flight leaves Omaha 7:28 pm, flies non-stop to Sioux City, Iowa and then to Sioux Falls, South Dakota, and Minneapolis/St. Paul, Minnesota.
- 300 Originates in Kansas City, Missouri, 5:30 pm, and flies non-stop to Omaha, Nebraska, arriving 6:20 pm. This flight leaves Omaha, Nebraska 6:40 pm, flying non-stop to Minneapolis/St. Paul, Minnesota.
- 322 Originates in Kansas City, Missouri, 9:45 pm, flying non-stop to Omaha, Nebraska, arriving 10:35 pm. This flight leaves Omaha, 10:55 pm, flying non-stop to Sioux City, Iowa and Sioux Falls, South Dakota and then on to Minneapolis/St. Paul, Minnesota.

Daily Aircraft Time in Nebraska as Compared with Total System Aircraft Time

		Nebraska Time		Total
		Air	Ground	
1.	Southbound	23	1:09	1:14
2.		395	:20	:20
3.		39	:15	:15
4.		97	:15	:15
5.		9	1:09	1:29
6.		319	:20	:20
7.		7	9:05	9:05
8.	Northbound	16	:15	:15
9.		18	:15	:15
10.		4	1:09	1:29
11.		302	:20	:20
12.		38	1:09	1:29
13.		300	:20	:20
14.		322	:20	:20
Total		4:36	12:50	17:26
System Total (27 x 24:00)				648:00
Ratio—Nebraska to System				2.70%
Eight aircraft operate the above schedules in normal rotation.				

[fol. 20] 6. Miles traveled by passengers originating and terminating in Nebraska compared with system passenger miles—July 15, 1951, to January 31, 1952:

Passenger Miles of Passengers Originating and Terminating in Nebraska	Passenger Miles Mid-Continent System	Ratio of Nebraska to System
39,215	84,605,029	.046%

7. Revenue derived from passengers originating and terminating in Nebraska as compared with system passenger revenue—July 15, 1951, to January 31, 1952:

Passenger Revenue of Passengers Originating and Terminating in Nebraska	Passenger Revenue Mid-Continent System	Ratio of Within Nebraska Income to System Income
\$2,404.68	\$4,750,440.09	.051%

8. The mileage is ninety miles from Lincoln, Nebraska, to the state's border near Rulo, Nebraska, and it takes forty-two minutes to fly that distance. There are four such flights daily. Most of the flights being those in and out of Omaha, Nebraska, take off and enter the state in a matter of seconds because the Omaha airport adjoins the Missouri River, which is the state boundary, and the flights come over the river and go out over the river to and from other states, except the flights above described to Lincoln since July 15, 1951. Each aircraft is on the ground at the airport to load and unload passengers and freight from five to twenty minutes, except the one flight per day leaving Minneapolis at 7:00 p.m., arriving in Omaha at 9:55 p.m., leaving Omaha at 7:00 a.m., arriving in Lincoln at 7:27 a.m., and from there the plane goes to points in Missouri and south in interstate commerce.

Summary of Carriage of Persons and Property between Lincoln and Omaha, Nebraska

July 15, 1951, to January 31, 1952

	Mail Pounds	Express Pounds	Freight Pounds	Number of Passengers
In Nebraska ..	11,906	5,319	4,864	713
System total ..	2,084,447	1,362,379	1,946,824	263,075
Ratio571%	.390%	.250%	.271%

[fol. 21] 9. Plaintiff's main executive offices were in Kansas City, Missouri, and are now in Dallas, Texas, owing to a consolidation of Mid-Continent Airlines, Inc., with Braniff Airways, Incorporated, which took place on or about August 1, 1952. Braniff Airways is a corporation organized and existing under the laws of the State of Oklahoma with its corporate place of business at Oklahoma City in said state and with its main executive offices at Dallas, Texas, and is organized for the same objects and purposes as plaintiff. Accordingly, the caption in this cause shall be "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," versus the defendants named. The defendants as named in the caption are the proper party defendants in this action.

10. The home port of plaintiff is and at all times mentioned herein has been at the Minneapolis-St. Paul airport, known as the Wold-Chamberlain Air Field, where plaintiff maintains repair shops, machinery, equipment, and hangars. To this port each of the aircraft, with all its flight equipment that alights from the air above Nebraska and ascends into the air from Nebraska, must be flown at designated times for governmental inspection, repairs, maintenance, tests, overhauling, and storage when not in use. None of such home port facilities were or are located in Nebraska. All aircraft of plaintiff must be returned to said home port at Minneapolis-St. Paul for governmental inspection and overhauling and relicensing before a period of fifty hours has expired on the engines and plane under the Civil Aeronautics Administration rules, under the authority of the Civil Aeronautics Code (49 USCA Ch. 9, §401-705).

11. The plaintiff's aircraft are flown through the air within the limits of aerial highways, specifically described and assigned by the United States Civil Aeronautics Administration to the plaintiff. Said aerial space is so described and outlined by said Administration as the fixed air lanes in which plaintiff's ships are required to fly when going from state to state into and from Nebraska. Said Administration issues, upon examination, the licenses for the aircraft, its engines, propellers, and all its flight
[fol. 22] equipment, including radio and all communica-

tion devices from and to the aircraft. Likewise, the Administration licenses the pilots and all personnel engaged in flight. All aircraft, engines, radio, communication apparatus, and flight equipment must fly to the Minneapolis-St. Paul home port of plaintiff, where all are located.

12. At the Omaha Municipal Airport the federal government, acting through said Administration, has constructed and maintains an airport traffic control tower at which there is stationed a chief airport controller and eleven assistants, all of whom are employed and paid by the United States at a payroll expense of about \$50,000 per year. This personnel and the equipment used are so stationed for the purpose of directing and controlling aircraft coming into or departing from the Omaha airport. Each aircraft of plaintiff coming into the airport receives, when about ten minutes out from Omaha, preliminary landing instructions, and is told by the government controller which landing runway to use and is given the traffic pattern, or may be instructed not to land. These government aircraft controllers at the Omaha airport are likewise in constant communication with other major aircraft control towers spaced throughout the parts of the United States directing flight in the air lanes through which plaintiff's planes are licensed and restricted to fly and from which they may descend and ascend in pursuance of their government licensed course and government approved schedules. These federal air lanes are laid out across the country and normally connect major air terminals. These air lanes are approximately ten miles wide and are established north, south, east, and west. Each air carrier has been granted certain priority authority. Radio facilities are provided by the government along these air lanes to direct all air traffic from one point to another. For planes not equipped with radio, the government provides and operates a radio beam. Also about each twenty miles on the ground are electrically operated beacons indicating that the designated air lane is above that light.

[fol. 23] 13. All violations of rules and regulations of the Civil Aeronautics Administration or of the Civil Aeronautics Code may be reported to the Administration by any person concerned. Violations of landing and take-off

regulations at an airport in Nebraska or elsewhere are by law federal offenses under the Civil Aeronautics Code. Such violations are punishable as by the law provided in the federal courts. (49 USCA §560, 610(a), 623; 61.306, 60.18(c), of Civil Air Regulations)

14. The plaintiff's aircraft, which land from the air lanes above and take off into them from the Nebraska airports, are each engaged as federally licensed air carriers of mail, persons, and property between the States of North Dakota, Minnesota, South Dakota, Iowa, Wisconsin, Illinois, Nebraska, Colorado, Missouri, Oklahoma, Arkansas, Tennessee, Louisiana, Texas, and now Mexico and South America.

15. At the close of the year 1951 the total operating revenue of plaintiff (Mid-Continent) was \$9,818,363. Total operating expense was \$9,508,859. Net profit after taxes was \$135,941. The revenue miles flown were 9,556,459. The revenue passengers carried were 441,115. The pounds of mail and cargo carried were 10,200,000.

16. The gross income from passengers for 1951 was \$7,681,760.80; from mail, \$1,608,590.65; from freight, express, and excess baggage, \$331,261.23; from chartered planes and other transportation, \$171,037.96; and from miscellaneous sources, \$25,712.68. Total for 1951, \$9,818,363.32.

17. Capitalization (Mid-Continent): Common stock issued and outstanding, 418,755 shares par value \$1.00; debentures due May 1, 1954, \$50,000; May 1, 1959, \$100,000; May 1, 1962, \$150,000; May 1, 1963, \$1,000,000.

18. Plaintiff pays approximately \$22,000 per year for depot rental space, landing fees, and other facilities at the Municipal Airport in Omaha.

19. In addition to the \$22,000 per year, the plaintiff pays two and a half cents per gallon tax on gasoline fuel supplied [fol. 24] to its aircraft at Omaha. In 1951 567,000 gallons were taken on in Omaha, resulting in a net tax to the State of Nebraska of \$14,180.00.

20. The personal property of plaintiff, such as office furniture and equipment, auto trucks, and all similar property, is taxed in Douglas County. Also such property would be taxed in Lancaster County, if any such property

is there located. In Douglas County this tax is \$200 to \$300 per year. Comparable amounts are paid in other municipalities in other states where the aircraft land and take off.

21. In a return made by plaintiff to the defendant Board for taxation for 1950, 9% of the total was given as the proper per cent of revenue originating in Nebraska based on ticket sales, and $11\frac{1}{2}\%$ of the total system tonnage originated in Nebraska for 1950.

22. The plaintiff made out and filed its return under forms furnished by the defendant Tax Commissioner for 1950, and the assessment was as follows. The Mid-Continent Airlines assessment for 1950 was compiled by the defendant Tax Commissioner from forms filled out, signed, and returned by the plaintiff. The tax for 1950 was \$4,280.44, and it remains unpaid. The defendants fixed as the valuation figure \$118,901.00 for plaintiff's flight equipment for Nebraska. The rate of levy was 36 mills, resulting in the tax of \$4,280.44 for 1950. The valuation was determined by the Tax Commissioner as follows.

[fol. 25] Airline Assessments 1950

Mid Continent Airlines

1. System Value Formula

A. Five Year Average Net Operating Income Capitalized at 6%	\$5,484,350
B. Five Year Ave. Mkt. Value of Stocks and Bonds	3,927,634
C. Book Value Depreciated Cost Basis	707,864
Average of A, B and C or System Value ..	3,373,283

2. Flight Equipment Apportionment Formula

A. Ratio of Flight Equipment Cost (Sec. B) to Total Operating Prop- erty Cost (Sec. F)	1,771,360	61.1%
	<hr/>	
	2,899,660	

B. Ratio of Depreciated Cost Value of Flight Equipment (Sec. C) to Depreciated Cost Value of Total Operating Property (Sec. F)			237,322	33.5%
			<hr/> 707,864	-
Average of A and B or Apportionment Factor				47.3%
3. Allocation Formula				
A. Ratio of Arrivals and Departures within Nebraska to Total Arrivals and Departures			10,306	9.032
			<hr/> 114,104	
B. Ratio of Revenue Tons Handled in Nebraska to Total Revenue Tons Handled			8,008	11.541
			<hr/> 69,389	
C. Ratio of Revenue Originating within Nebraska to Total Revenue			537,894	9.235
			<hr/> 5,824,803	
Average of A, B and C or Allocation Factor				9.936
4. Allocated Value (Result of System Value \times Apportionment Factor \times Allocation Factor)				
$3,373,283 \times 47.3 = 1,595,563 \times 9.936 = 158,535$				
5. Equalized value				
$158,535 \times 75\% = \$118,901$				

[fol. 26] 23. For the year 1951 the plaintiff failed to file the return, and defendants accordingly used the same ratio formulae for 1951 as returned for 1950, changing only the mill levy from 36 to 38, which was the average levy throughout the whole state for 1951. The mill levy is obtained by the defendants' computing the total amount of property taxes levied in the state and dividing that total by the total assessed valuation of property for the state, and that re-

sulted in the mill levy of 36 and 38, respectively, for 1950 and 1951. For the year 1951 the tax assessed was \$4,518.29 which remains unpaid. These taxes are drawing interest and penalties as by law provided.

24. The tax in question is assessed only against regularly scheduled air carriers upon their flight equipment, which is the fully equipped airplane, operating from without the State of Nebraska and into and out of Nebraska, and is not applied to carriers who operate only intermittently in the State of Nebraska in flights from and back to a fixed base in Nebraska. Such planes are assessed by the local county assessors in the county in which the base is located.

25. The State Tax Commissioner, in assessing plaintiff's aircraft and arriving at the ratios and the resulting tax, followed the state statutes which the Attorney General advised were applicable, and used the unit rule to arrive at the whole system value, and then used the statutory ratios to determine the valuations for Nebraska. It is these sections of the Nebraska law that are now under attack as unconstitutional under the Federal Constitution, as set forth in the petition on file herein. The defendants' position is made clear by their answer on file herein. The taxing statutes in question are copied herein as follows:

[fol. 27]

Chapter 77

Revenue and Taxation

RSN 1943, Reissue of 1950

77-1244. *Personal property; taxation of air transportation carriers; definitions.* As used in sections 77-1244 to 77-1246:

(1) The term "air carrier" means any person, firm, partnership, corporation, association, trustee, receiver, or assignee, and all other persons, whether or not in a representative capacity, undertaking to engage in the carriage of persons or cargo for hire by aircraft; any air carrier as herein defined, engaged solely in intrastate transportation, whose flight equipment is based at only one airport within the state, shall be excepted from taxation under this sec-

tion, but shall be subject to taxation in the same manner as other locally assessed property;

(2) The term "aircraft arrivals and departures" means (a) the number of scheduled landings and takeoffs of the aircraft of an air carrier, (b) the number of scheduled air pickups and deliveries by the aircraft of such carrier, and (c) in the case of nonscheduled operations, shall include all landings and takeoffs, pickups and deliveries;

(3) The term "flight equipment" means aircraft fully equipped for flight and used within the continental limits of the United States.

(4) The term "originating revenue" means revenue to an air carrier from the transportation of revenue passengers and revenue cargo exclusive of the revenue derived from the transportation of express or mail; and

(5) The term "revenue tons handled" by an air carrier means the weight in tons of revenue passengers and revenue cargo received and discharged as originating or terminating traffic.

Source: Laws 1947, c. 266, § 1, p. 858; Laws 1949, c. 231, § 5, p. 641.

77-1245. *Personal property; taxation of air transportation carriers; assessment; collection.* Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios; (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and

(3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period.

Source: Laws 1947, c. 266, § 2, p. 859.

77-1246. *Personal property; taxation of air transportation; laws applicable.* Real property and personal property, except flight equipment, of an air carrier shall be taxed in accordance with the applicable laws of this state.

Source: Laws 1947, c. 266, § 3, p. 860.

77-1247. *Personal property taxation of air transportation carriers; annual report; contents.* Each air carrier, as defined in section 77-1244, shall on or before June 1 in each year make to the Tax Commissioner, containing the information necessary to determine the value of its flight equipment and the proportion allocated to this state for purposes of taxation.

Source: Laws 1949, c. 231, § 1, p. 641.

[fol. 28] 77-1248. *Personal property; taxation of air transportation carriers; Tax Commissioner; report to State Board of Equalization and Assessment.* The Tax Commissioner shall ascertain from the reports made, and from any other information obtained by him, the value of flight equipment of air carriers and the proportion allocated to this state for the purposes of taxation, as provided in section 77-1245, and shall make a report thereof to the State Board of Equalization and Assessment as to each air carrier.

Source: Laws 1949 c. 231, § 2, p. 641.

77-1249. *Personal property; taxation of air transportation carriers; State Board of Equalization and Assessment; levy.* The State Board of Equalization and Assessment shall each year make a levy for purposes of taxation against the value so ascertained and determined by the Tax Commissioner, as provided in section 77-1248, at a rate which shall be equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local,

levied throughout the several taxing districts of the state for the preceding year.

Source: Laws 1949, c. 231, § 3, p. 641.

77-1250. *Personal property; taxation of air transportation carriers; levy; collection; payment.* When levied, the tax shall be collected and paid in the same manner as the tax on car companies as provided in sections 77-629 to 77-631.

Source: Laws 1949, c. 231, § 4, p. 641.

[fols. 29-30] 26. The tax collected from air carriers flying in and out of Nebraska under the act is used for the general expenditures of the state. In making the levy based upon the valuations and ratios above set forth, no ratio is determined by the defendants of intrastate to interstate business carried on by the plaintiff in Nebraska.

27. The rate of tax levy imposed upon plaintiff's flight equipment, pursuant to the legislative enactment here in question, is equal, as nearly as may be, to the average rate of all general taxes, state, county, municipal, school, and local, levied throughout the several taxing districts of the state for the preceding year.

Dated at Omaha, Nebraska, February 24, 1953.

Mid-Continent Airlines, Inc., a Corporation, Plaintiff, By (S.) William J. Hotz, Hotz & Hotz, Its Attorneys, 1530-5 City National Bank Building, Omaha 2, Nebraska.

Dated at Lincoln, Nebraska, February 26, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants, By Clarence S. Beck, Attorney General. By (S.) C. C. Sheldon, Assistant Attorney General.

[fols. 31-32] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

STIPULATION RE SUBSTITUTION OF PARTIES—April 24-25, 1953

It is hereby stipulated and agreed that since the start of these proceedings by application to file original petition in this Court, in pursuance of which the petition was filed July 15, 1952, and in which the persons named in the caption were made defendants, there has been a change in the state offices of said officials, as follows:

1. Robert B. Crosby is now Governor instead of Val Peterson.
2. Frank Marsh is Secretary of State instead of James S. Pittenger.
3. Norris J. Anderson is Nebraska State Tax Commissioner instead of Philip K. Johnson.

In consequence thereof, the parties hereto stipulate and agree that in the listing of the defendants in these proceedings, the names of the present incumbents of the above-designated state officials, as members of the defendant Nebraska State Board of Equalization and Assessment, shall be substituted without further consent or notification, it being the intention that this stipulation shall govern said matter of substitution.

Dated April 24, 1953.

Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated, Plaintiff, By (S.) Wm. J. Hotz, of Hotz & Hotz, Its Attorneys, 1530-5 City National Bank Building, Omaha, Nebraska.

Dated April 25, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants, By Clarence S. Beck, Attorney General, By (S.) C. C. Sheldon, Asst. Attorney General, Its Attorneys.

[fols. 33-34] SUPREME COURT OF NEBRASKA, JANUARY TERM,
A. D. 1953.

MID-CONTINENT AIRLINES, INC., a corporation, Plaintiff

v.

NEBRASKA STATE BOARD OF EQUALIZATION & ASSESSMENT
et al, Defendants

Original. No. 33260

JUDGMENT—July 17, 1953

This cause coming on to be heard upon petition of plaintiff, the answer of defendants thereto, briefs and argument of counsel, was submitted to the court; upon due consideration whereof, the court finds that Sections 77-1244 to 77-1250, Revised Statutes of Nebraska, 1943, are not violative of Article I, section 8, clause 3, Article I, section 9, clause 6, or Article I, section 10, clause 3, of the Constitution of the United States on the basis here challenged and that the petition of plaintiff should be dismissed. It is, therefore, considered, ordered and adjudged that the petition of plaintiff be, and it hereby is, dismissed at the cost of plaintiff, taxed at \$——; for all of which execution is hereby awarded.

[fol. 35] IN SUPREME COURT OF NEBRASKA

MID-CONTINENT AIRLINES, INC.

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT

OPINION—Filed July 17, 1953

1. Statutes providing for the levy of an ad valorem personal property tax on flight equipment used in interstate commerce, when such flight equipment is wholly and continuously outside of the state of the owner's domicile during the tax year, is not violative of the Commerce Clause of the Constitution of the United States when such tax

bears a fair and reasonable relation to the use of the property in the taxing state.

2. Sections 77-1244 to 77-1250, R. R. S. 1943, on the grounds here challenged, held not violative of Article I, section 9, clause 6, Article I, section 10, clause 3, or Article I, section 8, clause 3, of the Constitution of the United States.

[fol. 36] Heard before Simmons, C. J., Carter, Messmore, Yeager, Chappell, Wenke, and Boslaugh, JJ. Carter, J.

This is an original action for a declaratory judgment commenced in this court to test the validity of sections 77-1244 to 77-1250, R. R. S. 1943. Such sections of the statutes authorize the assessment, levy, and collection of an ad valorem personal property tax against plaintiff's flight equipment used in interstate commerce. Plaintiff contends that such taxation violates Article I, section 8, clause 3, of the Constitution of the United States, commonly referred to as the Commerce Clause. The defendants deny the unconstitutionality of the Nebraska act and assert the right to impose an ad valorem personal property tax upon plaintiff's flight equipment which is used within the state as a part of a system of interstate air commerce over fixed routes on regular schedules, so long as the allocation of the proportionate part of the property value and the levy thereon bear a fair and reasonable relation to the use of such flight equipment within the state. Briefly this constitutes the issue before the court.

Plaintiff is a corporation organized and existing under [fol. 37] the laws of the State of Delaware with its corporate place of business at Wilmington in that state. The main executive offices of the plaintiff were in Kansas City, Missouri, until the consolidation of plaintiff with the Braniff Airways, Incorporated, was effected on or about August 1, 1952, at which time such offices were moved to Dallas, Texas. It is stipulated that Braniff Airways, Incorporated, is substituted for Mid-Continent Airlines, Incorporated, as the party plaintiff. The home port to which all its fleet of planes must return is Minneapolis and St. Paul, Minnesota. Plaintiff is licensed by the Civil Aeronautics Board of the United States to engage in interstate

transportation by air for hire under the provisions of Title 49, U.S.C.A., sections 401 to 705. Pursuant to such authority it operates a large number of aircraft upon regular schedules in trunk line flight from Minot, North Dakota, to New Orleans, Louisiana, making regular landings in North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Illinois, Kansas, Missouri, Oklahoma, Arkansas, Texas, and Louisiana. No planes land in plaintiff's domiciliary state of Delaware. Plaintiff operates over 7,336 of unduplicated route miles. Plaintiff's activities in Nebraska consist of making landings at Omaha and Lincoln on regularly [fol.38] scheduled stops on interstate flights. There are 14 of such flights in and out of Omaha each day and 4 such flights in and out of Lincoln. These stops are made to handle mail, express, freight, and passengers and are usually of short duration, generally from 5 to 20 minutes. The home port for all planes here involved is the Wold-Chamberlain Air Field at St. Paul, Minnesota, where hangars, repair shops, and equipment are maintained. Municipal and federal government facilities are used at Omaha and Lincoln. The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo it is 90 miles, these being the only routes traveled by any of plaintiff's planes in Nebraska within the limits of aerial routes specifically assigned by the Civil Aeronautics Administration. It is not disputed that plaintiff's operations are interstate in character and are subject to regulation by the federal government as an interstate common carrier. The gross income of plaintiff for 1951 was \$9,818,363, and the net profit was \$135,941. The income from the carriage of passengers, mail, freight, express, excess baggage, chartered planes, and miscellaneous sources is set forth in the record [fol.39] by stipulation. Plaintiff pays for depot rental space at Omaha in the amount of \$22,000 a year, and a tax of 2½ cents a gallon on gasoline used which amounted to \$14,180 in 1951. The tax levied in 1950 was \$4,280.44, and in 1951 it was \$4,518.29.

The formula for the assessment of the tax on flight equipment, defined in the statute as aircraft fully equipped for flight and used within the continental limits of the United

States, is set forth in section 77-1245, R. R. S. 1943, as follows: "Any tax upon or measured by the value of flight equipment of air carriers incorporated or doing business in this state shall be assessed and collected by the Tax Commissioner. The proportion of flight equipment allocated to this state for purposes of taxation shall be the arithmetical average of the following three ratios: (1) The ratio which the aircraft arrivals and departures within this state scheduled by such air carrier during the preceding calendar year bears to the total aircraft arrivals and departures within and without this state scheduled by such carrier during the same period; Provided, that in the case of nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures; (2) the ratio which the revenue tons handled by such [fol. 40] air carrier at airports within this state during the preceding calendar year bears to the total revenue tons handled by such carrier at airports within and without this state during the same period; and (3) the ratio which such air carrier's originating revenue within this state for the preceding calendar year bears to the total originating revenue of such carrier within and without this state for the same period." It is the contention of the plaintiff that the taxing of its flight equipment is prohibited by the Commerce Clause in any amount whatsoever. The question to be determined, therefore, is whether or not the levy of any ad valorem personal property tax on the flight equipment of the defendant on an allocation basis contravenes the Commerce Clause of the Constitution of the United States.

In *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283, 153 A.L.R. 245, the court dealt with the taxation of airplanes by the State of Minnesota which were engaged in interstate commerce. The plaintiff was a Minnesota corporation, its principal place of business was in St. Paul, Minnesota, and the latter city was the home port of all its planes. All of its planes were continuously engaged in flying from state to state as interstate car- [fol. 41] riers except when laid up for repairs. The taxing authorities of Minnesota assessed a tax on the full value of the entire fleet of planes belonging to the plaintiff which

came into the state. In upholding the tax on the full value of all of the planes of Northwest Airlines in Minnesota, the court said: "Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the 'home port' of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. See *State Tax Comm'n v. Aldrich*, 316 U. S. 174, 180. No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet, as a business fact. No other State is the State which [fol.42] gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequence of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personality which is permanently attributable to Minnesota and to no other State." In so holding the court specifically stated that the taxability of any part of this fleet by any other state than Minnesota, in view of the taxability of the entire fleet by that state, was not before, or decided by, the court. It was on this latter point that differences arose over the proper disposition of the case. Interstate commerce may be required, of course, to pay its fair share of the property tax burden which the states, in which the interstate business is done, may lawfully impose generally on property located in them. In other words, interstate commerce bears no undue part of the burden if the personal property tax imposed by a given state is exclusive of all other property taxes assessed by other states, or, what is

more material to the case before us, if the tax on its personal property regularly used over fixed routes in [fol. 43] interstate commerce, both within and without the taxing state, is fairly apportioned to its use within the state. The failure of the court in the Northwest Airlines case to decide whether or not the factors set forth, which permitted full taxation in Minnesota, had the corresponding effect of preventing any taxation in any other state where interstate business was transacted by Northwest Airlines by means of the fleet of planes there involved, was the cause of the major division of the court on the issues involved. The majority to be consistent would necessarily be required to deny the right of taxation to other states in which Northwest Airlines planes engage in interstate business, or depart from the court's numerous holdings that multiple taxation of property used in interstate commerce constitutes an unlawful burden thereon in compelling the carrier to pay the taxing states more than its fair share of taxes measured by the full value of the property. It is axiomatic, we think, that if one state may properly tax the full value of the property, other taxes levied by other states would be a multiple taxation of the property constituting an unconstitutional burden upon interstate commerce.

The essential facts in the present case do not bring it [fol. 44] within any announced rules that would permit any one state to levy an ad valorem personal property tax for the full value of the planes involved. In the present case the corporation domicile is in Delaware, its general offices in Texas, and the home port of the planes in Minnesota. Under such a division of the factors announced and considered in the Northwest Airlines case we cannot say that the fleet of planes in the case at bar has any taxable situs in any one state where the full value of such planes could be taxed. Under such a situation we think the Northwest Airlines case leaves the door open for a decision on the issue as to whether or not, in a case such as we have here in which no state has a right to tax the fleet at full value, each state through which the planes land and engage in interstate business may tax a part of

their value, if it is fairly related to their use within the taxing state. The overall result of the Northwest Airlines case is that where the owner of a fleet of airplanes engaged in interstate commerce is a corporation of the state levying the tax with its principal place of business and the home port of all its planes within the same state, such state may tax the full value of the planes. Whether or not the taxing of the whole value in such state operates to exempt [fol. 45] them from taxation in other states in which they engage in interstate business is specifically reserved by the opinion and casts serious doubt on the right of other states to do so unless, possibly, evidence of a tax situs in other states would have called for a different result. In any event, the authority of Minnesota to tax the full value of the fleet of planes rests upon the express presumption that in flying in interstate commerce on regular schedules through several states they had not acquired a permanent taxable status elsewhere, although some of them had actually been taxed in other states. Whether this means the result would have been different if it had been shown that there was a taxable situs in other states, or, whether it means that multiple taxation of tangible property is to be allowed even though the aggregate assessment exceeds the full value of the property, remains unanswered. We assume the former, in view of the many holdings of the United States Supreme Court relative to multiple assessments on property in interstate commerce which exceed the full value of the property as being an undue burden under the Commerce Clause.

In the later case of *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432, 93 L. Ed. 585, [fol. 46] the court sustained an apportioned ad valorem personal tax levy by the nondomiciliary state of Louisiana upon a fleet of vessels engaged in interstate commerce in inland waters. The facts show that the vessels in question came into New Orleans where they were left for unloading and reloading. They were then moved to ports outside the state. They were operated on no fixed schedule but the turn-arounds were made as quickly as possible. They remained only long enough to unload and take on cargo and to make necessary and temporary repairs. The

State of Louisiana and the city of New Orleans levied ad valorem taxes on assessments based on the ratio between the total number of miles of lines in Louisiana and the total number of miles of all of the carrier's lines. In upholding the tax the court said: "It seems therefore to square with our decisions holding that interstate commerce can be made to pay its way by bearing a nondiscriminatory share of the tax burden which each State may impose on the activities or property within its borders. * * * We can see no reason which should put water transportation on a different constitutional footing than other interstate enterprises." Paraphrasing the latter statement, "We can see no reason which should put air transportation on a different constitutional footing than other interstate enterprises."

[fol. 47] In the subsequent case of *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427, 26 A.L.R. 2d 1371, the principle that vessels moving on inland waters in interstate commerce could be taxed by a state through which they passed on the basis of that portion of the value of the vessels represented by the ratio between the total number of miles in the taxing state and the total number of miles in the entire operation is adhered to as a proper method of tax allocation. The *Peck* case distinguishes *Northwest Airlines, Inc. v. Minnesota*, *supra*, on the basis that it was not shown in the latter case that "a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere." The further statement in the *Peck* case to the effect that "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile", appears to sustain an allocation tax in a case such as we have before us in which no part of the property taxed was in the domiciliary state during the tax year. The holding in the *Northwest Airlines* case that the tax in that case on the full value of the air fleet was valid is based on a premise that is wholly absent in the present one.

[fol. 48] The case relied upon the most to sustain the allocation theory of taxing personal property used in interstate commerce is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613. It involved a tax on Pullman cars that were continuously moving in

and out of the State of Pennsylvania. The fundamental concepts which support the allocation theory of taxing personal property used in interstate commerce are set forth in this case. The legal fiction that all personal property has its situs at the owner's domicile is abandoned, and the system of taxing it at the place at which it is used and by whose laws it is protected, when it is employed in a business requiring continuous and constant movement from one state to another, is plainly and definitely announced. That this case is relied upon in the *Ott and Peck* cases is clear. For reasons stated in the *Pullman's Palace Car Company* case, we think the inland water transportation cases are particularly applicable. The court in the *Pullman* case said: "No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation [fol. 49] requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse." Air transportation likewise requires no artificial roadways other than port facilities. The rule as to one would appear to be fully applicable to the other.

The plaintiff relies primarily upon the following cases to sustain its position. *Gibbons v. Ogden*, 9 Wheaton 1, 6 L. Ed. 23; *Smith v. Turner*, 7 Howard 282, 12 L. Ed. 702; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; *New York Central & H. R. R. Co. v. Miller*, 202 U. S. 584, 26 S. Ct. 714, 50 L. Ed. 1155; *Union Tank Car Co. v. McKnight*, 84 F. 2d 421; *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508, 95 L. Ed. 573; *Johnson Oil Refining Co. v. Oklahoma*, 290 U. S. 158, 54 S. Ct. 152, 78 L. Ed. 238; *City of Chicago v. Willett Co.*, 344 U. S. 574, 73 S. Ct. 460, 97 L. Ed. 333. We do not consider these cases controlling in the issue before us. A careful reading of some of them, however, indicates that they support the theory of the defendant. Some announce principles which have been abandoned in the natural course of change in our economic and [fol. 50] transportation systems. Others are based on

facts which clearly distinguish them from the present case while others involve a tax in no way resembling an ad valorem tax on personal property. The plaintiff also cites *Pullman's Palace Car Co. v. Pennsylvania*, *supra*, *Ott v. Mississippi Valley Barge Line Co.*, *supra*, *Northwest Airlines, Inc. v. Minnesota*, *supra*, and *Standard Oil Co. v. Peck*, *supra*, which in our opinion definitely sustain the position of the defendant as we have heretofore stated.

It seems clear, therefore, that Nebraska and other similarly situated states have the power to impose an apportioned ad valorem personal property tax upon the flight equipment of this plaintiff, which is engaged in interstate commerce within the taxing state, when it has been wholly and continuously outside the state of the owner's domicile, and the assessed value of the property bears a fair and reasonable relation to the use made of it in such taxing state.

The petition alleges also that the statutes in question are unconstitutional in that they violate Article I, section 9, clause 6, and Article I, section 10, clause 3, of the Constitution of the United States. These questions appear to have been abandoned in the brief and oral argument. We hold, however, that the foregoing constitutional [fol. 51] provisions were not violated on the basis of the authorities cited dealing with the alleged violation of Article I, section 8, clause 3, of the Constitution of the United States.

The foregoing disposes of the only question raised by the petition. Plaintiff in its brief states: "Plaintiff contends such taxation by defendants is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, which vests in Congress the exclusive right to regulate commerce among the states, and the levy of such tax by the defendants constitutes regulation. No state constitutional question or other legal issue is presented for the Court's decision." We consequently limit the issue strictly to that raised by the petition. The plaintiff does not allege that the formula set forth in the statute produces an assessed value that does not bear a fair and reasonable relation to the use of the property within this state. That issue was not alleged, briefed, or argued by the plaintiff.

We do not deem this issue to be before the court for its determination.

We find that the act is not violative of Article I, section 8, clause 3, Article I, section 9, clause 6, or Article I, [fols. 52-53] section 10, clause 3, of the Constitution of the United States, on the basis on which it is here challenged. The petition of the plaintiff is therefore dismissed.

Dismissed.

[fols. 54-55] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

BRANIFF AIRWAYS, INCORPORATED, Plaintiff-Appellant

v.

NEBRASKA STATE BOARD OF EQUALIZATION AND ASSESSMENT;
NORRIS J. ANDERSON, Nebraska State Tax Commissioner;
ROBERT B. CROSBY, Governor of Nebraska; FRANK MARSH,
Secretary of State of Nebraska; RAY C. JOHNSON, State
Auditor; FRANK B. HEINTZE, Treasurer of Nebraska;
and CLARENCE S. BECK, Attorney General of Nebraska,
Defendants-Appellees

PETITION FOR APPEAL—Filed October 14, 1953

TO: THE HONORABLE ROBERT G. SIMMONS, Chief Justice of
the Supreme Court of Nebraska:

Plaintiff-appellant in the above-entitled cause is aggrieved by the final Opinion, Judgment and Decree of the Supreme Court of the State of Nebraska, filed and entered July 17, 1953, and does hereby pray that an appeal be allowed to the Supreme Court of the United States from said final Opinion, Judgment and Decree and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond pending the final disposition of this appeal; that the amount of security be fixed by the order allowing the application; that the material parts of the record, proceedings, and papers upon which said final Opinion, Judg-

ment and Decree was based, duly authenticated, be sent to the Supreme Court of the United States in Washington, District of Columbia, United States of America, in accordance with the Rules in such cases made and provided.

Dated October 14, 1953.

Respectfully submitted, William J. Hotz, William J. Hotz, Jr., Robert M. Kane, Counsel for Plaintiff-Appellant, Hotz & Hotz, Attorneys at Law, 1530-5 City Natl. Bank Bldg., Omaha, Nebraska.

[fol. 56] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed
October 14, 1953

Braniff Airways, Incorporated, plaintiff-appellant on this appeal (successor to Mid-Continent Airlines, Inc., Statement of Facts, Appendix C of Jurisdictional Statements), files this Assignment of Errors upon which it bases its prayer for reversal of the Opinion, Judgment and Decree filed and entered by the Supreme Court of Nebraska on July 17, 1953 (Appendix A of Jurisdictional Statement). Said Opinion held valid the Nebraska ad valorem taxing statute (Appendix B of Jurisdictional Statements) designed to assess plaintiff-appellant's aircraft because the aircraft came into Nebraska and departed therefrom while solely engaged in interstate commerce. In consequence thereof, the state statute is repugnant to the Constitution of the United States, Article I, Section 8, Clause 3, and the court below erred in holding the said Nebraska statute valid. This appeal is prosecuted by virtue of Title 28, United States Code, Section 1257(2). Reference is herein made to the Jurisdictional Statements, filed October 14, 1953, and to the said Opinion, set forth therein as Appendix A.

The Supreme Court of Nebraska, in announcing the said opinion filed on July 17, 1953, committed reversible error as follows:

1. The Court erred in holding the Nebraska *ad valorem* taxing statute valid as against appellant's attack under the Commerce Clause, when it appeared that the state [fol. 57] statute in question devised a plan of arriving at the valuation of plaintiff-appellant's aircraft on the basis of the number of stops at the airports in Nebraska and the tonnage and the revenue which the Nebraska operations bore to the total number of stops and total tonnage and revenue of the plaintiff-appellant's entire system. These three factors in no way pertain to the aircraft's attaining a taxable situs, but pertain only to business done as a basis for valuation of the aircraft. It is apparent that the method of arriving at a valuation of the aircraft may be constitutionally valid only if the property sought to be taxed in fact attained a taxable situs within Nebraska.

2. The Court erred in assuming that such essential taxable situs existed as a matter of law solely because the plaintiff-appellant's airplanes came into and departed from Nebraska on regular schedules, stopping from five to twenty minutes each, as shown in the Opinion and the Stipulation of Facts, copies of which are appended to the Jurisdictional Statements as A and C. The Court failed to find and announce that such stops at the airports were essential and necessarily a part of interstate commerce. The Court failed to recognize that such flights from the air and back into the air were wholly disassociated from the concept of the law in reference to obtaining a taxable situs within the state as a base for proportional valuation for the *ad valorem* tax upon plaintiff-appellant's aircraft.

3. The Court erred in concluding in the Opinion that the allocation method of taxation was an acceptable one and applying it, when the Court under the Stipulation of Facts and under its own findings in the Opinion should have concluded as a matter of law that appellant's airplanes could attain no taxable situs within the State of Nebraska by merely landing and taking off while engaged in commerce among the states. The State of Nebraska's taxing power may not legally reach into the airplanes above Nebraska

for the purpose of allocating said lanes as a part of the State's jurisdiction.

[fol. 58] 4. The Court erred in failing to recognize and hold that the Nebraska statutes in question were revenue-producing statutes to raise funds for the general income of the State of Nebraska and in failing to find no reciprocal benefits of sufficient value to justify the ad valorem tax on the basis of benefits received.

5. The Court erred in failing to find and determine that the plaintiff-appellant paid taxes upon all its property, both real and personal, that was grounded or remained within the State of Nebraska for sufficient time to gain a taxable situs. The facts are stipulated in reference to such taxes. They are for depot rental and for the privilege of landing at the Municipal Airport at Omaha, Nebraska, in the amount of \$22,000 a year. These landing charges are based upon the number of landings and weight of the aircraft. The depot rental is based upon a square-foot charge. In addition thereto, plaintiff-appellant pays a tax of $2\frac{1}{2}\text{¢}$ per gallon for all gasoline purchased at the airports in Nebraska. This tax aggregated \$14,180 for the year 1951. These taxes continue and are paid when due. In consequence thereof, the Court erred in failing to find that appellant pays its share of the cost of government in respect to such uses, and does similarly pay for all reciprocal benefits received from the State of Nebraska. The ad valorem tax drawn in question has no basis for the validity found in terms of reciprocal benefits.

6. The Court erred throughout the Opinion in adopting principally the language of the dissenting opinion in the case of *Northwest Air Lines, Inc. v. Minnesota* (1944), 322 U.S. 292, 64 S.Ct. 950, to sustain its views. In so doing the Court overlooked the majority opinion in said case which was based upon the fact that Minneapolis-St. Paul airfield was the "home port" of the appellant in that action, and that Minnesota was the state of that airline's creation. The State of Minnesota was permitted for such two reasons to tax such aircraft as had attained a taxable situs in that state while there for other purposes than flights in and out of that state. The Braniff Airways, Incorporated, is

incorporated under the laws of Oklahoma. Its home port is at the Minneapolis-St. Paul airport, and its main offices at Dallas, Texas. Mid-Continent Airlines was incorporated and based also in other states than Nebraska.

[fol. 59] 7. The Court erred in failing to differentiate and discuss the cases cited in the Opinion on page 434 of 157 Nebraska. The Court summarily dismissed the authority of those cases by stating, "We do not consider these cases control in the issues before us." None of said cases is authority or precedent for holding the Nebraska statutes, herein drawn in question, valid and enforceable as an ad valorem revenue-producing law, when upon the face of the statute it is plain the tax is levied and assessed against the plaintiff-appellant's aircraft which are instrumentalities of interstate commerce and were so engaged when the tax was levied in 1950, 1951, and now in 1952 and 1953, all of which are contested in this action.

8. The Court erred in its failure to recognize as a matter of law that Congress has preempted the field of aviation by the enactment of Chapter 9 of Title 49, U.S.C., to which reference is made in the Jurisdictional Statement wherein the citations are given. Section 403 thereof dedicates and declares to exist for all the citizens of the United States a public right of freedom of transit in air commerce through the navigable air space above the United States. The Supreme Court of Nebraska erred in that it failed to recognize that the air above Nebraska came within that congressional declaration. The Nebraska Court erred when it stated, "The flight distance from Omaha to Lincoln is 60 miles and from Lincoln to Rulo (Nebraska) it is 90 miles," thus giving credence to such distances as if the aircraft were traveling upon the state highways of Nebraska or upon rights-of-way within the Nebraska jurisdiction. By such reference and finding the Court sought to affix land-borne formulae to aircraft flying above the State for the determination of proportional valuation of such aircraft while solely engaged in interstate commerce. This result produces the obvious error of attributing to the aircraft a taxable situs in Nebraska.

9. The Court further erred in failing to recognize Section

452 of the Civil Aeronautics Act, wherein there were established areas and duties of the governmental administration in reference to the flight carried on by plaintiff-appellant. The Court failed to recognize that the Stipulation of Facts [fol. 60] specifically brought forth that the aircraft in question went into and out of Nebraska on regularly assigned aerial highways under and by virtue of the supervision and traffic direction of United States Government employees at the control tower owned, run, operated, and financed entirely by the Federal Government at Omaha, Nebraska. The Court thus failed to recognize that the traffic carried on by appellant's air carriers in the space above Nebraska is outside the jurisdiction of Nebraska as to situs, operation, and police power. The Civil Aeronautics Act, with all its amendments, clearly establishes these factors (see citation to entire Civil Aeronautics Code in Jurisdictional Statement).

10. The Court further erred in failing to recognize the decisional law that has been announced in reference to the air above Nebraska and all other states of the United States. The Supreme Court of the United States held in *U.S. v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, that:

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared."

The position of defendants-appellees taken below that the aircraft are taxed in fair and reasonable relation to the "use of such equipment within and through the state" was erroneously affirmed by the court below, when the taxed aircraft were neither "within nor through" the state at any time except to land and to take off and to load and unload interstate mail, freight, express, and passengers.

11. The Court has erred in seeking to establish by the Opinion the fairness and reasonableness of the valuation formulae set forth in the statute, when the question submitted to the Court was the repugnancy of the entire *ad valorem* statute in question to the Commerce Clause of the

Federal Constitution as a burden upon interstate commerce. The Stipulation of Facts of record proves that the aircraft of plaintiff-appellant were in the State of Nebraska while solely engaged in interstate commerce rather than kept or remaining within the State for any other use. In consequence thereof, the valuation formulae [fol. 61] declared fair and reasonable by the court below in its Opinion is an erroneous conclusion because based upon conditions of flight that cannot reach nor be applied to Braniff Airways operating in Nebraska.

12. The Court erred in recognizing as a valid exercise of the taxing powers of the State of Nebraska the application of the formulae set forth in Section 77-1245 of said Act (Appendix B attached to Jurisdictional Statements). It is apparent from the Act itself that the defendants-appellees, in order to apply said formulae, must do so in violation of Article I, Section 9, Clauses 5 and 6, and Section 10, Clauses 2 and 3, of the Constitution of the United States. Those sections of the Constitution prohibit states from levying a tax, directly or indirectly, upon goods, wares, and merchandise imported from one state to another and laying a duty based upon tonnage without the consent of Congress. By the Civil Aeronautics Act Congress has kept to itself all power of regulation over air carriers and their respective aircraft engaged in interstate commerce, and likewise over those aircraft that are used in intrastate commerce because of the necessity of even intrastate flights entering into the domain of exclusive federal jurisdiction when they fly into the air above a state. (*Rosenhan v. U. S.*, 131 F. 2d 932; cert. denied.)

13. The Court erred when it considered in point to sustain its holding of validity of the taxing statute in question the cases of *Pullman's Palace-Car Co. v. Commonwealth of Pa.* (1891), 141 U.S. 18, 11 S.Ct. 876, and *Ott v. Mississippi* (1949), 336 U.S. 169, 69 S.Ct. 432. It appeared in both cases that the instrumentality (in one case Pullman cars, and in the other, inland vessels) had attained a taxable situs within the state by the instrumentalities' being kept there long periods of time and in great numbers. It was stated in the *Pullman* case in reference to the non-taxability of ships and vessels engaged in interstate com-

merce, with a home port elsewhere, that such are not subject to taxation. "But this is because they are not, in any [fol. 62] proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs,—their home port, and the domicile of their owners." In the *Ott* case the question submitted to the court and presented in the briefs clearly set forth that the vessels that were taxed because doing business on the inland waters within the State of Louisiana had attained a taxable situs therein, and that the statute "was intended to cover and actually covers here, an average portion of property permanently within the state—and by permanently is meant throughout the taxing year."

14. The Court erred in assuming that the plaintiff-appellant's aircraft were doing business within the State of Nebraska and thus subject to ad valorem taxation therein, merely because the aircraft were required necessarily to alight from the airplanes above the State solely to load and unload persons and property in interstate commerce and to depart immediately when that work was completed within from five to twenty minutes. Such holding was in direct opposition to the mandate of Article I, Section 8, Clause 3, of the Federal Constitution, which was presented to the court below and rejected as shown by the Opinion. The Supreme Court of Nebraska has recognized in similar instance that a city ordinance that required a tax or license of a firm taking orders for merchandise within the city without maintaining an established place of business therein, was repugnant to the Commerce Clause of the Federal Constitution. *Best & Co. v. City of Omaha* (1948), 149 Neb. 868, 33 N. W. 2d 150; cert. denied. The Supreme Court of Nebraska stated in that case:

"* * * The court held that the power granted to Congress to regulate commerce among the states, being exclusive when the subjects are national in their character, and admitting only of one uniform system of regulation, the failure of Congress to exercise that power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. In the opinion the court

said: 'In a word, it may be said, that in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. The doctrine of the freedom of that commerce, except as regulated by Congress, is so firmly established that it is unnecessary to enlarge further upon the subject. [fols. 63-64] "The court further held that interstate commerce cannot be taxed at all by a state even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the state.

* * * * *

"We conclude that the ordinances in question directly and unlawfully regulate and burden interstate commerce in violation of Article I, Section 8 of the Constitution of the United States."

15. The Court erred in failing to recognize and apply the concepts of law set forth in *Spector Motor Service, Inc. v. O'Connor* (1951), 340 U.S. 602, 71 S. Ct. 508, wherein the Supreme Court of the United States held:

"This proceeding attacks, under the Commerce Clause of the Constitution of the United States, art. 1, § 8, cl. 3, the validity of a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State when (1) the business consists solely of interstate commerce, and (2) the tax is computed at a nondiscriminatory rate on that part of the corporation's net income which is reasonably attributable to its business activities within the State. For the reasons hereinafter stated, we hold this application of the tax invalid."

Wherefore, plaintiff-appellant, Braniff Airways, Incorporated, prays that the final Opinion, Judgment and Decree of the Supreme Court of Nebraska be reversed, and for such other and further relief as the Court may deem proper, and for its taxable costs expended herein.

Dated October 14, 1953.

Signed by Counsel of Record.

[fols. 65-104] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

STATEMENT REQUIRED BY RULE 12(2) (omitted in printing)

[fols. 105-106] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

ORDER ALLOWING APPEAL—October 14, 1953

Plaintiff-appellant having made and filed its petition praying for an appeal to the Supreme Court of the United States from the final Opinion, Judgment and Decree of this Court in this cause entered on July 17, 1953, and from each and every part thereof, and having presented its Assignment of Errors and Prayer for Reversal and the Statement as to the Jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and Rules of the Supreme Court of the United States in such cases made and provided,

It is therefore ordered that said appeal be and the same is hereby allowed as prayed.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Five Hundred Dollars (\$500.00), with good and sufficient surety conditioned as may be required by law.

It is therefore ordered that citation shall issue accordingly.

Dated October 14, 1953.

Robert G. Simmons, Chief Justice, Supreme Court of the State of Nebraska.

[fols. 107-108] Citation in usual form showing service on Clarence S. Beck (omitted in printing).

[fols. 109-110] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

ORDER DIRECTING CLERK OF THE SUPREME COURT OF NEBRASKA TO TRANSMIT APPEAL PAPERS TO THE CLERK OF THE SUPREME COURT OF THE UNITED STATES (omitted in printing)

[fols. 111-113] Bond on Appeal for \$500.00 filed October 14, 1953 (omitted in printing).

[fol. 114] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

PRAECIPE—Filed October 16, 1953

To: George H. Turner, Clerk of the Supreme Court of Nebraska:

You will please prepare a transcript of the record in the above-entitled cause, which was an original action in the Supreme Court of Nebraska, General Number 33260, and which was entitled Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated, as plaintiff, versus Nebraska State Board of Equalization and Assessment, et al., as defendants. The said plaintiff will be carried forth in the appeal papers as Braniff Airways, Incorporated, as plaintiff-appellant, and the defendants as now existing in their respective offices as defendants-appellees.

1. The Petition filed in the Supreme Court of Nebraska on July 15, 1952, by plaintiff-appellant.
2. Answer of defendants-appellees, filed August 18, 1952.
3. Stipulation of Facts, filed February 26, 1953.
4. Stipulation in reference to substituted party defendants in the respective offices, filed April 25, 1953.

5. Opinion, Findings, Conclusions, Judgment and Decree of the Supreme Court of Nebraska, designated as the final Opinion of said Court, filed and entered July 17, 1953.

6. Order Allowing Appeal, signed and entered October 14, 1953.

7. Assignment of Errors and Prayer for Reversal, filed Oct. 14, 1953.

8. Petition for Appeal, filed October 14, 1953.

9. Citation, signed and entered October 14, 1953.

[fols. 115-116] 10. Jurisdictional Statements, filed October 14, 1953.

11. Statement required by Rule 12(2), including Rule 12(3), filed October 14, 1953.

12. This Praecipe, filed October 16, 1953.

13. Appeal Bond, approved and filed October 14, 1953.

14. Stipulation of parties in reference to proceeding in the appeal as "Braniff Airways, Incorporated, Plaintiff-Appellant."

15. Stipulation withholding execution and distress warrants during pendency of appeal.

16. Order that appeal papers be forwarded to Supreme Court of the United States, signed and entered October 14, 1953.

17. Judgment of the Supreme Court of Nebraska, entered with the Opinion on July 17, 1953.

Dated October 15, 1953.

Signed by Counsel of Record.

[fols. 117-118] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

[Title omitted]

STIPULATION RE SUBSTITUTION OF THE NAME, BRANIFF AIRWAYS, INCORPORATED, AS PLAINTIFF-APPELLANT—October 16, 1953

It is stipulated by and between the parties hereto that the caption on the appeal to the Supreme Court of the

United States in this cause shall be "Braniff Airways, Incorporated, Plaintiff-Appellant," in lieu of "Mid-Continent Airlines, Inc., now Braniff Airways, Incorporated," which was the caption designation in the Supreme Court of Nebraska.

This stipulation is in accordance with the Stipulation of Facts on file with the appeal papers and attached to the Jurisdictional Statements as Exhibit C, which stipulations, as shown therein, were due to the legal consolidation and merger of Mid-Continent Airlines with Braniff Airways, Incorporated, and Braniff Airways, Incorporated, assuming and continuing the affairs of Mid-Continent Airlines, Inc., with its own affairs as Braniff Airways, Incorporated.

Dated October 15, 1953.

Nebraska State Board of Equalization and Assessment, et al., Defendants-Appellees, By Clarence S. Beck, Attorney General, By C. C. Sheldon, Assistant Attorney General; Braniff Airways, Incorporated, Plaintiff-Appellant, By William J. Hotz, Of Hotz & Hotz, Its Attorneys, 1530 City National Bank Building, Omaha, Nebraska.

[fols. 119-120] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

STIPULATION RE WITHHOLDING EXECUTION—October 15, 1953

It is stipulated and agreed by and between the parties hereto that the provisions of paragraph 10 of the Answer of the defendants-appellees filed in the above-entitled cause on August 18, 1952, to wit,

"That no distress warrant has heretofore been issued and that none would be issued during the pendency of the litigation concerning the validity of the challenged statute,"

shall now be made the subject matter of this stipulation during the pendency of this appeal to the Supreme Court of the United States, and that execution shall be stayed until the final decision in this cause in reference to the challenged statute shall have been rendered; that likewise no distress warrants may be issued for taxes assessed under the said challenged statute during the pendency of the appeal and the final determination of the validity of said challenged statute.

Dated October 15, 1953.

Signed by Counsel for Respective Parties.

[fol. 121] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. —

ACKNOWLEDGMENT OF RECEIPT OF SERVICE OF APPEAL PAPERS
(Omitted in printing)

[fol. 122] IN SUPREME COURT OF NEBRASKA

CLERK'S CERTIFICATE

STATE OF NEBRASKA,
Lancaster County, ss:

I, George H. Turner, Clerk of the Supreme Court of Nebraska and custodian of the records and files thereof, do hereby certify that the foregoing pages, numbered 1 to 121, inclusive, are a true, full and complete transcript of all such parts of the record and proceedings in the case of Mid-Continent Airlines, Inc., v. Nebraska State Board of Equalization & Assessment, No. 33260, and also of the Opinion of this Court rendered therein, as are mentioned and described in the praecipe for this record as the same now appear of record and on file in my office.

In witness whereof, I have hereunto set my hand and officially affixed the seal of said court at my office, in the City of Lincoln, Nebraska, this 19th day of November, 1953.

Geo. H. Turner, Clerk of Supreme Court of Nebraska. (Seal.)

[fol. 123] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 476

POINTS RELIED UPON FOR REVERSAL

Plaintiff-appellant's statement of Points Relied Upon for Reversal is intended to include all the points set forth in the Assignments of Error and Prayer for Reversal. The Assignments of Error are condensed as the Points Relied Upon for Reversal, as follows:

1. A Nebraska ad valorem taxing statute, Sections 77-1244 to 77-1250, Reissue Revised Statutes of Nebraska for 1943, was passed in 1949, effective for 1950. By virtue of said Statute the defendants-appellees, who are the final taxing authorities for Nebraska, assessed thereunder general revenue-producing State taxes for 1950, and subsequent years, against plaintiff-appellant, who is Braniff Airways, Incorporated. The assessment so made was based upon the value of the plaintiff-appellant's aircraft under a formula defined in the Act.

2. The Supreme Court of Nebraska on July 17, 1953, entered a Final Opinion and Judgment for the taxes so levied and assessed, deciding with finality that the aforesaid State Statute was valid and the assessments thereunder enforceable against appellant airline. The defenses asserted by appellant that the Nebraska Statute was repugnant to the Commerce Clause of the Federal Constitution (Article I, Section 8, Clause 3) and the Tonnage Clause (Article I, Section 10, Clause 3) were rejected. The court below committed reversible error in so deciding.

3. Appellant substantiates its Prayer for Reversal on the aforesaid federal constitutional grounds because, from

the Stipulation of Facts of record and the facts set forth in the Opinion of the Supreme Court of Nebraska, it appears that:

(a) Nebraska is neither the state of creation nor the home port of the plaintiff-appellant, Braniff Airways, Incorporated, nor its predecessor, Mid-Continent Airlines, Inc.

(b) None of the aircraft of appellant were in the State of Nebraska any time for repairs, storage, inspection, governmental tests, or rebuilding.

(c) All aircraft in question of appellant were flown onto a municipally owned airport in Nebraska, in accordance with the terms of a previously executed contractual right with the municipality. The descent was from federally exempted and controlled airlines above the State and was done solely in pursuit of appellant's commerce among the several states. After unloading and loading persons and property from without the State or destined from Nebraska to other states, the aircraft were flown from the airport into the airlines above solely in furtherance of appellant's interstate commerce missions among the several states.

(d) For the aforedescribed stops in Nebraska appellant was and is charged by the airport authorities, and accordingly pays for each of said landings and take-offs based upon the certified tonnage of each aircraft, defined in the aforementioned written contract between appellant and the municipality. State gasoline taxes were and are also paid by appellant upon fuel bought at the airport and used to propel its aircraft in interstate flight. Depot privileges for the use of appellant in carrying on its interstate business and for the use of passengers and for the handling of [fol. 125] mail, freight, and other personal property are paid for by appellant upon a square-foot rental basis set forth in the same contract with the municipality, which provides for landing and take-off charges.

(e) The period of time each of appellant's aircraft is on the ground at the airport in Nebraska is from five to twenty minutes. The stops are made at scheduled

times by appellant and are made solely in pursuit of its commerce among the several states.

(f) The appellant's aircraft traverse no lands in Nebraska at any time except incidental to alighting from and ascending into the sky from the runways of the airport, as aforesaid.

(g) The incident of the tax, according to the taxing Statute in question, is the aircraft fully equipped for flight.

(h) The National Congress has, by legislation in force at all times herein involved, assumed the duties of licensing, supervising, regulating, and controlling aviation, including all the landings and take-offs. In execution of this national legislation the United States owns, operates, finances, and maintains a control tower in Nebraska at the municipal airport for such purposes. In consequence thereof, Congress has pre-empted the field of aviation, including the flights in and out of the airports of Nebraska, leaving no reciprocal benefits to be granted by Nebraska for the State taxes assessed. No inspection laws, no quarantine or other health regulations, public welfare or police regulations of the State are here involved, for the tax income is for the general state fund.

4. Furthermore, the formula set forth in the Nebraska Act to arrive at the valuation of the aircraft upon which the ad valorem tax was and is levied, is constitutionally invalid because, in effect, it requires a vessel bound to or from one state to another to pay a State tax based upon the tonnage and capacity of the vessel, which is in violation of the Tonnage Clause (Article I, Section 10, Clause 3) of the Constitution of the United States.

[fol. 126] 5. The Final Opinion, Judgment, and Decree of the Supreme Court of Nebraska entered below should be reversed because the decision upholds as valid the State taxing Statute which places a burden upon interstate commerce and is repugnant to the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States.

6. Likewise, the burden cast upon commerce is made clear by the express provision of the State Act that the

tax in question is levied to produce general revenue for the State, and the valuation for the levy and assessment of the tax is based upon the tonnage of the vessels, which are the various aircraft, as the instrumentalities of commerce. Thus, the Act is in violation of and repugnant to the Tonnage Clause, Article I, Section 10, Clause 3, of the Constitution of the United States.

Dated November 24, 1953.

Braniff Airways, Incorporated, Plaintiff-appellant,
By William J. Hotz, Of Hotz & Hotz, Its Attor-
neys, 1530-5 City National Bank Building, Omaha,
Nebraska.

Service acknowledged and receipt of one copy hereof this
25th day of November, 1953.

C. C. Sheldon, Asst. Atty. Gen., Attorney for De-
fendants-Appellees.

[fol. 127] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

No. 476

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that the printed record shall consist of the following:

1. The caption of the case shall be that set forth in the Petition for Appeal, page 54, and shall be set forth once on the first pleading printed. Thereafter the word "caption" shall appear.

2. The signatures appearing on the Petition for Appeal, page 54, of the respective counsel shall be as there stated, with the addition of the name of Roger J. Whiteford of the firm of Whiteford, Hart, Carmody & Wilson, 815 Fifteenth Street, N. W., Washington, D. C., as attorney on the brief for Braniff Airways, Incorporated.

3(a) Wherever the signatures of counsel appear on the appeal papers, there shall appear once the names of Wil-

liam J. Hotz, William J. Hotz, Jr., and Robert M. Kane, 1530-5 City National Bank Building, Omaha, Nebraska, as attorneys for plaintiff-appellant, and thereafter the names need not be further printed. The printed record shall state, "Signed by counsel of record."

(b) The signatures of counsel for defendants-appellees shall be once stated as "Clarence S. Beck, Attorney General of Nebraska, and C. C. Sheldon, Assistant Attorney General, as the attorneys of record for defendants-appellees. Thereafter the names need not be further printed, but the printed record shall state, "Signed by counsel of record."

4. The following appeal papers shall be copied in full, with the exceptions above noted:

(a) Petition for Appeal, page 54.

(b) Order Allowing Appeal, with date and signature of the Chief Justice of the Supreme Court of Nebraska, page 105.

[fol. 128] (c) Assignments of Error and Prayer for Reversal, page 56, with the exception of caption and signatures, including the prayer and date.

(d) Jurisdictional Statement, page 68, eliminating caption but including filing date. The appendixes shall be printed only once in the printed record, and if printed with the Jurisdictional Statement, shall be referred to in other appeal papers as accompanying the Jurisdictional Statement, giving page number in printed record.

(i) Appendix A attached to the Jurisdictional Statement shall consist of the Judgment, page 33, and the Opinion, page 35, it being the intention that both the Judgment and the Opinion shall be set up as an appendix to the Jurisdictional Statement and thereafter need not be reprinted but referred to by printed page number.

(ii) Appendix B is the state statute drawn in question and referred to as Sections 77-1244 to 77-1250, Re-issue Revised Statutes of Nebraska for 1943. These are attached to the Jurisdictional Statement, page 68, and when once printed, may be referred to by page number of the printed record.

(iii) Appendix C shall be printed only once with the Jurisdictional Statement. This is the Stipulation of Facts attached to the Jurisdictional Statement, page 68. When this Stipulation of Facts is once printed in the record, it may suffice, and whenever else referred to in the printed record, it shall set forth the printed page where the same may be found. The date shall be stated on the Jurisdictional Statement. In the Stipulation of Facts the sections of the Nebraska statute, 77-1244 to 77-1250, may be omitted and reference made to the same statute printed as Appendix B.

(e) Citation of Appeal, page 107, eliminating the caption but stating, "To (all defendants-appellees set forth in the above caption)." Then set forth only the body of the Citation, the date and the signature of the court, and include the acknowledgment of the service of the Citation and the signature thereon.

(f) Print only the following in connection with the Order Directing Clerk to Transmit Appeal Papers, page 109: "October 14, 1953, Order signed by Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, directed Clerk of that court to transmit appeal papers to the Clerk of the Supreme Court of the United States."

(g) Bond for Costs on Appeal, page 111, need be copied only by stating, "Surety company bond in the amount of \$500 signed October 14, 1953, approved by Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska."

(h) Statement Required by Rule 12(2), page 65, need not be printed in full, but state "Statement Required by Rule 12(2) was signed by attorneys for the plaintiff-appellant and served upon counsel for defendants-appellees October 14, 1953, and service of the same acknowledged on October 14, 1953. Included in the Statement so served was a copy of Rule 12, paragraph 3, which was set forth in full."

[fol. 129] (i) Acknowledgment of Receipt of Service of Appeal Papers (page 121) should state only, "Service of appeal papers on October 16, 1953, was acknowledged by attorneys for defendants-appellees as follows: (Here set forth the 12 items listed, with no further printing.)"

(j) Stipulation re Withholding Execution, instead of printing in full state, "On October 15, 1953, the respective

parties agreed that execution would be withheld in reference to the taxes in question during the pendency of the appeal." (page 119).

(k) Stipulation re Substitution of the Name, Braniff Airways, Incorporated, as plaintiff-appellant, page 117, shall be copied verbatim, with the statement that it was signed by counsel for the respective parties.

(l) Petition in the original action for declaratory judgment, page 3, shall be set forth in full, except caption and signatures, giving date and stating, "signed and verified by counsel for plaintiff-appellant."

(m) Answer, page 9, shall be set forth in full, except caption and signatures, giving date and stating, "signed and verified by counsel for defendants-appellees."

(n) Stipulation re Change in Incumbency of State Officers to comply with the names stated in the caption, signed by the respective parties need be set forth only by the following statement: "The parties stipulated on April 24 and 25, 1953, that the parties appearing at the time of filing the Petition for Appeal on October 14, 1953, were as set forth in the caption on the Petition for Appeal." (page 31).

(o) Praecipe (page 114) shall be set forth in full with the exception of caption and signatures.

(p) Certificate (page 122) shall be set forth in full.

Dated November 23, 1953.

Braniff Airways, Incorporated, Plaintiff-Appellant,
By Wm. J. Hotz, Of Hotz & Hotz, 1530 City National Bank Building, Omaha, Nebraska, Its Attorneys; Nebraska State Board of Equalization and Assessment, et al., Defendants-Appellees, By Clarence S. Beck, Attorney General, By C. C. Sheldon, Assistant Attorney General.

[fol. 130] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 476

ORDER NOTING PROBABLE JURISDICTION—January 4, 1954
Appeal from the Supreme Court of the State of Nebraska

The statement of jurisdiction in this case having been
submitted and considered by the Court, probable juris-
diction is noted.

January 4, 1954.

(2892)

